No. 83-1944

IN THE

Supreme Court of the United States

October Term, 1984

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director
Department of Motor Vehicles, State of Nebraska,

Petitioners,

vs.

FRANCIS J. QUARING,

Respondent.

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA IN SUPPORT OF AFFIRMANCE

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Interest of the *Amici*

This brief is submitted with the consent of the parties by the American Jewish Congress and the Synagogue Council of America. AJCongress is a national organization of American Jews, founded in 1918 to protect the religious, civil, political and economic rights of Jews and to promote

the principles of democracy. The AJCongress' interest in this case arises from its long-standing commitment to the First Amendment's guarantee of religious liberty, which is dependent no less on the guarantees of the Free Exercise Clause than those of the Establishment Clause.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

This case raises three issues. The first is largely factual and is peculiar to this case—whether the state has a compelling interest in insisting that all those who seek to secure a driver's license allow themselves to be photographed, including those with religious objections to photographs. The broader, and more important, issues raised by petitioner are: 1) whether the Free Exercise Clause mandates that states, in administering programs which confer benefits on their citizens, must excuse compliance with a re-

quirement of general applicability to accommodate the religious practices of religious minorities, even if there is no fundamental right to the benefit conferred by the statute; and 2) whether any such exemption would run afoul of the Establishment Clause by preferring religion over non-religion, or by requiring intrusive inquiries into the sincerity of those invoking the Free Exercise Clause.

The Solicitor General, in an *amicus* brief filed on behalf of the United States, urges a radical restructuring of Free Exercise doctrine. Under the Solicitor's approach, the burden in Free Exercise cases would shift from the cost to government of allowing an exemption to the importance of the challenged governmental practice. Only if the entire program could be redesigned without substantial cost to the effectiveness of the program would Free Exercise claims be honored.

All of these issues are of importance to American Jews who frequently find it necessary to seek such exemptions. Because the law as it is presently understood by public officials allows for, and often requires, such exemption, Jews and other religious minorities have been able to freely observe the dictates of their religion without being forced to turn down governmental benefits generally available to all.

Acceptance of Nebraska's arguments on either of the broader issues, or agreement with the Solicitor General's rewriting of the law of Free Exercise, would substantially alter that state of affairs to the disadvantage of American Jews and members of other religious minorities. Such a result would severely diminish the vitality of religion in this country, stifling the growth of new forms of religious

practice and experience. A reversal of the judgment below would be as harmful to religious liberty as an abandonment of the Establishment Clause.

Summary of Argument

Respondent's request to be excused, for religious reasons, from Nebraska's requirement of a photograph on drivers' licenses expressly falls within the protection of the Free Exercise Clause of the First Amendment. Petitioners' assertion that a religiously based exemption from a generally applicable statute constitutes a preference for religion, and, therefore unconstitutionally establishes religion, is wholly without merit. This Court has categorically rejected precisely that argument in a long line of cases from the *Selective Draft Law Cases,* 245 U.S. 366 (1918) to *Thomas* v. *Rev. Bd.,* 450 U.S. 707 (1981).

In addition, Respondent is not asserting a right to a drivers' license, but rather a fundamental Free Exercise right to be excused from the photograph requirement. Faced with this simple request to permit accommodation of a religious choice, petitioners must demonstrate a compelling state interest for requiring photographs on each and every drivers' license without exception. Nebraska is unable to meet that burden of proof. Neither the state's interest in facilitating financial transactions and highway identification, nor its interest in avoiding administrative headaches, is sufficient to outweigh a citizen's right to Free Exercise of religious liberty. And any inquiry as to sincerity is not unduly entangling.

ARGUMENT

I.

Granting An Exemption From A Statute of Neutral Application Does Not Establish Religion

Introduction

Petitioners argue that any religiously based exemption from a generally applicable statute would treat religion preferentially and, therefore, necessarily unconstitutionally establish religion. Their argument tracks that of Professor Kurland, *Religion and the Law of Church and State and the Supreme Court* (1962) that the religion clauses are to be read together to impose a principle of neutrality, under which religion is not a basis for governmental classification, either to benefit or disadvantage religion. That argument is, of course, not new; on the contrary, as we demonstrate below, it has been frequently raised, and just as frequently rejected.

A. *This Court Has Held That Free Exercise Accommodation Is Not Necessarily An Establishment of Religion*

The need to reconcile the Establishment and Free Exercise Clauses became evident as the Free Exrcise Clause was expanded to protect religiously motivated action in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940), which unambiguously rejected the argument, accepted by this Court in *Reynolds**

* The overruling of *Reynolds*' belief/action dichotomy does not dictate a different result on the facts of that case, as this Court noted in *Sherbert* v. *Verner*, *supra*, 374 U.S. at 403. There, the Court

(footnote continued on next page)

v. *U. S.*, 98 U.S. 145 (1878), that the Free Exercise Clause protected only the freedom to believe, not the freedom to act on those beliefs. At the same time, the Establishment Claus was applied to activities of the modern welfare state substantially expanding its reach. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 Harv. L. Rev.* 1381, 1386-90 (1967).

As a result of those changes, this Court has observed that if both the Establishment and Free Exercise Clauses were expanded to their limits they would clash with each other, *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668-69 (1970); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). What is necessary is a balancing of the commands of both clauses so that neither overwhelms the other, and religious liberty is nurtured, *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1361 (1984).

This Court has interpreted the Establishment Clause so as to prohibit government from favoring religion over non-religion, *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Accordingly, the special status conferred on religion by the Free Exercise Clause—allowing those with religious scruples to avoid requirements generally binding on others—raises the spectre of an Establishment Clause violation by treating religion advantageously vis-a-vis non-religion philosophical objections to particular laws.

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placed the *Reynolds* result on the straight-forward ground that there was a compelling governmental interest in outlawing polygamy. Professor Giannella, in his landmark article, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1403-09 (1967), develops the rationale for this result at greater length.

This Court was not blind to this difficulty in *Sherbert* v. *Verner, supra,* but it found the argument so unpersuasive as not to merit prolonged discussion, 374 U.S. at 409:

> "In holding as we do, plainly we are not fostering the "establishment" . . . of religion . . . . [The decision] reflects nothing more than the governmental obligation of neutrality in the face of religious differences. . . . Nor does the recognition of the appellant's right . . . serve to abridge any other person's religious liberties."*

Earlier, this Court gave short shift to the argument that the exemption of ministers and divinity student from the draft established religion by granting a (quite substantial) benefit to religious practices. In the *Selective Draft Law Cases,* 245 U.S. 366, 389-90 (1918), this Court wrote only that the "unsoundness of the [argument] is too apparent" to require discussion.

Braunfeld v. *Brown,* 366 U.S. 599, 608-09 (1961) is particularly instructive. There, this Court rejected a claim that the Free Exercise Clause required Pennsylvania to carve out a Sabbatarian exemption to its Sunday Blue Laws. The Court reasoned, 366 U.S. at 609, that such an exemption might confer a competitive economic advantage on Sabbatarians, thus preferring one religion over another,

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* Justice Harlan (joined by Justice White), while dissenting from the majority's holding that the Free Exercise Clause *compelled* accommodation of Sherbert, agreed that the state *could* as a matter of legislative grace, grant Sherbert unemployment benefits.

In his concurring opinion in *Welsh* v. *United States,* 398 U.S. 333, 344 (1970), Justice Harlan, while not retreating from his position in *Sherbert* v. *Verner* that exemptions did not violate the Establishment Clause, would have held that such exemptions had to be provided to all who held moral objection to a particular practice, lest government prefer religion over non-religion. This Court has since rejected that position, *Wisconsin* v. *Yoder, supra,* 406 U.S. at 215-16.

or would unduly entangle the state in inquiries into the sincerity of those seeking to invoke the exemption—arguments with "substantial roots" in the Establishment Clause, *Welsh* v. *U.S., supra,* 398 U.S. at 372 (White, J., dissenting).

Nevertheless, the Court in *Braunfeld* v. *Brown* suggested that the legislative creation of a Sabbatarian exemption might "well be the wiser solution . . . ." 366 U.S. at 608. The very next year this Court upheld, against an Establishment Clause challenge, Kentucky's Sabbatarian exemption, *Arlan's Dep't Store of Louisville, Inc.* v. *Ky.*, 371 U.S. 218 (1962)—a result which the Court reaffirmed, with only the most cursory of explanations, in *Thomas* v. *Rev. Bd.*, 450 U.S. 707, 719-20 (1981).

B. *This Reconciliation Of The Clauses Is Consistent With The American Constitutional Tradition*

This Court's refusal to interpret the Establishment Clause as prohibiting the accommodation of religiously based action is well grounded in both history and public policy. While the history of the Free Exercise Clause is not as well known as that of the Establishment Clause, what little that is known suggests that the founders did not believe that an exemption for religious conscience would violate the Establishment Clause.

The question of what protection to afford religiously motivated actions arose as early as the drafting of the Declaration of Rights in the Virginia Constitution in 1776, Hunt, *James Madison and Religious Liberty,* American Historical Ass'n Annual Report, 165, 166 (1901) (hereafter Hunt, *Madison and Religious Liberty*). The original draft, prepared by George Mason, protected religious practices

"unless under color of religion any man disturb the peace, the happiness, or safety of society," Hunt, *Madison and Religious Liberty, supra,* at 166.

James Madison, one of the leading advocates of disestablishment at the time, as this Court has repeatedly noted, *see, e.g., Everson* v. *Bd. of Educ., supra,* 333 U.S. at 13-14 urged that this language did not go far enough. He would have permitted Free Exercise guarantees to be invoked unless "under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered." Hunt, *Madison and Religious Liberty, supra,* at 166-67.

As ultimately adopted, the Constitution did not adopt one or the other test, perhaps because there was no consensus on this score, but did incorporate general language protecting religiously motivated actions. *See,* Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 19-22 (1978). What is significant for present purposes is that the Declaration of Rights, as ultimately adopted, embodied a guarantee protecting religious practices which its authors did not find inconsistent with non-establishment.*

The events surrounding the drafting of the Virginia Declaration of Rights are not the sole historical sources

* In Malbin's view, Jefferson disagreed with both Madison and Mason, and, following Locke, would have afforded no special protection to religious action. Malbin concludes that the Free Exercise Clause should be interpreted as embodying Jefferson's views. His discussion is not persuasive, for he does not demonstrate why Jefferson's views, and not those of Madison or Mason, should be regarded as dispositive. And as we demonstrate in the text, there is other historical evidence suggesting that the states had a broader view of Free Exercise than did Jefferson.

which illuminate the First Amendment provisions. Several states objected to ratification of the Constitution on the ground that it did not provide sufficient protection for Free Exercise, *see, e.g.*, Antieau, Downey and Roberts, *Freedom From Federal Establishment*, 111-22 (1964).

State constitutional interpretations should also be considered in interpreting parallel federal provisions, *see*, Kauper, *Religion and the Constitution* 102-03 (1964); Katz, *Religion and American Constitutions* 63-64 (1964). While a few state courts have held that exemptions would 'establish religion,' *see, McGowan* v. *Md.*, 366 U.S. 420, 516-17, n.104 (1961) (Frankfurter, J., concurring) (collecting cases), the majority have considered Free Exercise Claims —sometimes upholding them, sometimes not—without regarding such exemptions as establishments. *See, generally*, Antieau, Carroll and Burke, *Religion Under The State Constitutions* 65-95 (1965).

Moreover, state legislatures frequently granted exemptions by statute. *McGowan* v. *Md.*, *supra*, 366 U.S. at 514-17 (Frankfurter, J., concurring) (collecting Sabbath Blue Law exemption statutes). In sum, the notion that the exemption of religious observers from laws of general applicability does not establish religion is well ingrained in American constitutional law.

C. *Petitioners' Establishment Clause Argument Misconceives The Nature Of Religious Liberty*

The twin provisions of the Constitution regulating church-state relations are together designed to insure "the fullest possible scope of religious liberty." *School District of Abington Twshp.* v. *Schempp*, 374 U.S. 203, 305

(1963) (Goldberg and Harlan, JJ., concurring). While there is no unanimity on the exact parameters of religious liberty, that concept at a minimum means "the right of a person freely to choose those forms of religious belief and expression which represent that individual's innermost expression of faith."*

The Free Exercise Clause contributes to this goal in obvious ways. Similarly, the Establishment Clause, by limiting the involvement of government, furthers religious liberty by insuring that religious choices are made free of government interference (the principle of voluntarism). It ensures that government is not responsive to or an advocate for, only those of one or more faiths.**

The Establishment Clause does not, however, demand "an untutored devotion to the concept of neutrality . . . which partakes not . . . of that noninterference and noninvolvement with the religious, but a brooding and pervasive devotion to the secular." *Id.* 374 U.S. at 306. Nor is it to be applied without regard to the equally compelling demands of the Free Exercise Clause. What the Constitution commands is, as Dean Katz put it, *Religion and American Constitutions, supra,* at 22, "a secular state—but a secular state which does not give preference to sec-

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* Testimony of Dean Norman Redlich, Judge Edward Weinfeld Professor of Constitutional Law, New York University School of Law, Hearings on *Proposed Constitutional Amendment to Permit Voluntary Prayer:* S.J. Res. 199, Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 447 (1982).

** The Establishment Clause also protects the secular integrity of government by insuring that it does not become a captive of religion, *Engel* v. *Vitale,* 370 U.S. 421, 426-429 (1962). We discuss this aspect of the Establishment Clause below in connection with the petitioners' entanglement argument.

ularism and is actively concerned for religious freedom." *cf.* Pfeffer, *The Supremacy of Free Exercise,* 61 Georgetown L. J. 1115 (1973).

The constitutionally mandated "active[] concern[] for religious liberty" compels* government to adjust its affirmative program of regulation to take into account the needs of those citizens whose religious practices are in conflict with majoritarian norms. The accommodation sought here does not interfere with, or influence, anyone else's religious choices; it merely allows the implementation of a prior, purely private, religious choice, *Mueller* v. *Allen,* 103 S.Ct. 3062, 3069 (1983); *Roemer* v. *Bd of Public Works,* 426 U.S. 736, 751 (1976). It does not in any meaningful sense establish religion. *See also, School Dist. of Abington Twshp., supra,* 374 U.S. at 307 (Goldberg, J., concurring (mandatory school prayer not on accommodation); Brief of the American Jewish Congress, *et al.,* in *Wallace* v. *Jaffree,* No. 83-812 at 27-36 (U.S. Sup. Ct., O.T. 1983).

Because the accommodation principle is available as a check on all governmental activity (although Free Exercise claims will not always be vindicated), and indeed has been applied to a wide range of statutes and practices, and on behalf of a multiplicity of different religious beliefs, there is no substantial risk of favoritism to any par-

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* The courts below held that Nebraska *must* accommodate Quaring's religious objections to being photographed. But petitioners' objection to accommodation as an establishment of religion could be made equally well—perhaps with greater force—where the state is not obligated to accommodate religion, but does so as a matter of grace. As *Arlan's Dep't. Store of Louisville, Inc.* v. *Ky., supra,* demonstrates, the argument is no more availing in such cases.

ticular sect or denomination.* Deferral to Quaring's objection by granting the exemption sought here cannot reasonably be seen by her or others as a governmental endorsement of her views, if for no other reason than that the petitioners are compelling all other applicants for a license to submit to the very practice she categorizes as idolatry.

Moreover, accommodating Quaring's concerns imposes no costs at all on others, let alone costs as substantial as those imposed upon others by the conscientious objection exemption, or the exemption from jury duty contemplated by *In Re Jenison,* 375 U.S. 14 (1963), *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963). It affords her no competitive advantage in business, *see, Kings Gardens, Inc.* v. *F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 996 (1974); *Amos* v. *Presiding Bishop,* 35 F.E.P. 1734 (D. Utah 1984), or with respect to some highly and independently desirable, but illegal, good such such drugs. Nor does it permit her to engage in any other conduct considered highly desirable by some, such as racial discrimination, *Bob Jones University* v. *U.S., supra,* 103 S.Ct. at 2037, n.30; Freed and Polsby, *Race, Religion and Public Policy*: *Bob Jones University* v. *U.S.,* 1983 Sup. Ct. Rev. 1 (1983). It infringes on no one elses religious liberty, *Sherbert* v. *Verner, supra,* 374 U.S. at 409.

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* Justice Stevens, concurring in *U.S.* v. *Lee,* 455 U.S. 252, 263, n.2 (1982), suggested that it might be best to eliminate all exemptions in order to avoid the suggestion of favoritism to those groups whose claims are recognized over those whose claims are rejected in the face of a compelling interest. *See also, Bob Jones University* v. *U.S.,* 103 S.Ct. 2017, 2035, n.30 (1983). As stated in the text, and with all respect, we believe this concern to be exagerated. Moreover, it does not give proper weight to the demands of the Free Exercise Clause.

Recognizing a Free Exercise claim here would send no message that religion is relevant to one's standing in the political community, *Lynch* v. *Donnelly, supra,* 104 S.Ct. at 1366 (O'Connor, J., concurring). On the contrary, exemption allows Quaring to participate more fully in an important aspect of day to day living in her community without sending any message to either Quaring or others as to her civic status.

II.

It Is The Right To Free Exercise That Is Essential—Not The Right To A Driver's License

A. *Free Exercise Is A Fundamental Right*

Professor, later Chief Justice, Stone, writing in 1919, eloquently explained that society's decision to respect the religious beliefs of those who cannot in good conscience comply with society's demands, proclaims the supreme significance a society places on the call of individual conscience:

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

Stone, *The Conscientious Objector,* 21 Col. Univ. Q. 253, 269 (1919). Because the Free Exercise Clause fulfills this vital function, only interests of the "highest order" defeat claims arising under it.

Of course, the policy of nuturing individual conscience has a price. Sometimes that price is too high to pay and the individual's conscience must yield. But respect for the right of conscience is, as Chief Justice Stone wrote, a high value in itself. It is that value, not the constitutional value of a driver's license, against which petitioners' claim that the price here is too high must be measured.

B. *It Is Irrevelant That There Is No Fundamental Right To A Driver's License*

Petitioners' lengthy argument (Brief 7-20) that there is no fundamental right to a driver's license is quite beside the point, and is nothing more than a repetition of South Carolina's unavailing argument in *Sherbert* v. *Verner, supra,* that unemployment benefits were a privilege, not subject to the Free Exercise guarantee. Unlike cases involving procedural due process, where the courts are called upon to weigh, on a more or less *ad hoc* basis, the nature and significance of an individual's interest in order to determine the extent of the process due, the Constitution itself provides that Free Exercise claims are entitled to the highest level of deference.

Petitioners' assert, that "if, in fact, Quaring is not entitled to a driver's license as a matter of right, her free exercise claim does not arise." (Brief at 9) Although petitioners are surely right that the ability to obtain a driver's license is not fundamental, *San Antonio Ind.*

School District v. *Rodriguez*, 411 U.S. 1, 33-35 (1973), it does not follow, as they argue, that no constitutional restraints apply to the issuance of licenses, *cf. Sherbert* v. *Verner, supra*, 374 U.S. at 404-05. It surely could not be contended, for example, that, because there is no constitutional right to a driver's license, that higher licensing standards for blacks would not violate the Equal Protection Clause of the Fourteenth Amendment.

Similarly, if Nebraska imposed higher standards for obtaining a license on those who believe that Jesus was not the messiah, or on those who believe that he was—in clear violation of the most basic comand of the Free Exercise Clause—the fact that there is no right to a license at all would be no bar to a successful challenge to that requirement, *Torcaso* v. *Watkins, supra.* No different result is called for here because the Free Exercise right asserted involves the protection of action, not belief alone. *Thomas* v. *Rev. Bd., supra; Wisconsin* v. *Yoder, supra; Sherbert* v. *Verner, supra.*

Petitioners' attempts to distinguish *Sherbert* v. *Verner* and *Thomas* v. *Rev. Bd.*, which require the state to accommodate the practice of the religious faithful in the operation of their programs, on the further ground that in those cases the "individuals *were* otherwise entitled" (Brief at 17) to the benefits. This attempted distinction, made by the United States as well, (Brief at 13) is without a factual basis.

In both *Sherbert* and *Thomas* unemployment benefits were not available to those who turned down employment for which they were qualified. Both Sherbert and Thomas

turned down such employment, and were thus not "otherwise entitled" to benefits. *See Sherbert* v. *Verner, supra,* 374 U.S. at 418-20 (Harlan, J., dissenting). It was only because the Free Exercise Clause invalidated application of the statutory prohibition on the payment of benefits to those who turned down employment that Sherbert and Thomas were "otherwise entitled" to unemployment benefits. *Cf. Thomas* v. *Rev. Bd., supra,* 450 U.S. at 723, n.1 (Rehnquist, J., dissenting) (pointing out that *Sherbert* v. *Verner,* 374 U.S. at 401, n.4 had left open whether the same result would accrue under a statute, like Indiana's, with no 'good cause' exception such as contained in South Carolina's statute).

No one questions that Quaring has satisfied all the other requirements for a driver's license, except for the taking of a photograph. She has passed the necessary tests and has demonstrated that she is capable of operating a car safely. She is thus "qualified" to obtain a license, but for her refusal to be photographed. The Free Exercise Clause should excuse her failure to comply with that requirement.

C. *The Refusal To Issue Quaring A License Constitutes Impermissible Coercion*

Free Exercise claims involving the right to practice one's beliefs are of two general types—challenges to those rules which are intended to outlaw a religious practice, *see, e.g., Reynolds* v. *U.S., supra,* and those in which the religious believer's idiosyncratic religious practices prevent him from complying with an affirmative obligation. In the former type of case, which is comparatively rare, the cost imposed on religious beliefs is readily apparent, although so too is the interest of the state.

No less real, though, are the costs imposed in the second class of cases. The burden imposed by neutral state practices which have a disparate impact on followers of a particular religion is substantial. While in such cases the state has not outlawed a religious practice, it imposes on those who observe such practices a substantial cost not imposed on others. In *Sherbert* v. *Verner, supra,* 374 U.S. at 403-04, this Court took note of the constitutional implications of this state imposed tax on religious practice:

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown, supra,* 366 U.S. at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

The plurality opinion in *Braunfeld* v. *Brown, supra,* 366 U.S. at 606, refusing to create a Free Exercise exemption to the Blue Laws for Sabbath observers, is read by petitioners (Brief at 20) as holding that indirect burdens are

not subject to Free Exercise claims. The illustrations cited in *Braunfeld* v. *Brown* as exemplifying this principle all involved burdens which were imposed by laws basic to the very organization of society—taxes, the five day work week and the like. Recognition of a Free Exercise right as against these practices would necesarily be a challenge to the most basic decisions about the way in which society has ordered itself. As the Chief Justice himself recognized, *Id.* at 607, however, this principle does not mean that all indirect burdens on religious practices are devoid of Free Exercise constraints. On the contrary, such practices must be accommodated "if the State may accomplish its purpose by means which do not impose such a burden." As we demonstrate in Point III, the state has not carried its burden, *Sherbert* v. *Verner, supra,* of proving that alternatives which would meet both its needs and those of Quaring are not available.

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* To be sure, there is at least an inconsistency of tone between the treatment of indirect burdens in *Braunfeld* v. *Brown* and *Sherbert* v. *Verner,* as Justice Stewart (374 U.S. at 413) and Justice Harlan (374 U.S. at 421) both observed in *Sherbert.* Since *Sherbert,* however, this Court has always used the *Sherbert* analysis, *see Wisconsin* v. *Yoder, supra,* 406 U.S. at 215; *Thomas* v. *Rev. Bd, supra,* 450 U.S. at 717; *Gillette* v. *U. S.,* 401 U.S. 437, 462 (1971); *U. S. v. Lee, supra,* 455 U.S. at 257-58; *see, generally,* Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, supra,* 80 Harv. L. Rev. 1381, 1398-1403 (1967); Kauper, *Religion and the Constitution, supra,* at 41-43; Katz, *Religion and American Constitutions, supra,* at 97-99; Tribe, *American Constitutional Law,* § 14-10, p. 854 (1978). To the extent that these decisions are not reconcilable, the plurality opinion of *Braunfeld* v. *Brown* should be reconsidered.

III.

No Compelling Interest Justifies The Refusal To Grant Quaring An Exemption

A. *The Inquiry Must Focus On The State's Interest In Not Accommodating Quaring*

The crucial question in Free Exercise cases is whether the state has a compelling interest in not accommodating the observer's religious practices. Petitioners offer two such justifications beyond the bold claim, discussed in Point I, *supra,* that any accommodation would violate the Establishment Clause. The first of these is the state's interest in identifying motorists, and providing identification for businesses; the second is avoiding the administrative headaches of administering an exemption.

Petitioner's claims at least focus on the correct inquiry —whether there is a compelling interest in not exempting Quaring from the photograph requirement. This inquiry properly focuses on the individual, for the Free Exercise Clause is intended, as we observed above, for the protection of the individual, Tribe, *American Constitutional Law, supra,* at § 14-10, p. 855.

The Solicitor General suggests a crippling transformation of the current test [Brief at 6] so that the inquiry focuses not on the individual, but on the interest of the state in the challenged requirement. That test is, as noted, *supra,* p. 14-5, inconsistent with the purposes of the Free Exercise Clause, and with this Court's cases.

Nowhere is the inconsistency between the test proposed by the United States and the case law cast in starker relief

than in *Wisconsin* v. *Yoder, supra,* a case which, not surprisingly, the brief of the United States does not discuss at all. Few state programs reflect a more fundamental interest of the state than compulsory education laws. This being so, on the United States' view, such a finding would end the matter.

It did not, however, end the matter for this Court, which proceeded to inquire whether an exemption for the Amish from secondary public education was so inconsistent with these goals as to outweigh the state's concededly important interest in education. This Court, canvased the ability of the Amish to provide alternatives which would meet much, although surely not all, of the state's interests in the challenged requirement.* It concluded that Amish children received sufficient public education, which, along with the learning provided by the Amish community itself, enabled them to function adequately in Amish society.

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* *In Re Jenison* is also instructive. There, Jenison objected to serving on a jury because it violated her religious beliefs against judging others. The Minnesota Supreme Court rejected this claim, and upheld a contempt conviction, 265 Minn. 96, 120 N.W.2d 515 (1962) on the ground that the state had an important, indeed, compelling interest, in citizen service on juries. No consideration was given to whether that interest would be significantly harmed if Jenison was excused. After this Court remanded for reconsideration in light of *Sherbert* v. *Verner,* 375 U.S. 14 (1963), the Minnesota Supreme Court reversed itself, and dismissed the conviction, 267 Minn. 136, 125 N.W2.d 588 (1963). It found that there was no showing that the state's interest in obtaining jurors would be impaired significantly if Jenison were excused. Under the test proposed by the United States the first decision of the Minnesota Supreme Court was correct, and the case should not have been remanded.

B. *The Asserted Compelling Interest In Positive Identification Is Not Sufficient To Outweigh Quaring's Claims*

The first interest asserted in the photograph requirement is that it provides a secure form of identification for highway stops and financial transactions. This latter suggestion can hardly be taken seriously. No statute requires all Nebraskans, or tourists, to carry photographic identification either in general, or when engaging in financial transactions. To the extent that this interest is intended to protect the well-being of those businesses which engage in such transactions, there is an alternative available which would easily accommodate Quaring. These businesses may simply refuse to do business with persons not having photographic identification.

The other alternative—that of providing sure identification during highway stops—is more weighty. However, in assessing the importance of the state's interest in accurate identification, it must be remembered that the photograph is not the only identification device available to the state. Descriptive material (height, weight, hair and eye color, sex, age, visible scars, and the like) can be required and are obligatory in those states, such as New York, which still does not require photographs on all drivers' licenses. The question, then, is whether the incremental advantage provided by a photograph is sufficiently weighty to overcome Quaring's interest in the Free Exercise of religion. With the courts below, we think not, particularly because whole categories of licenses are exempt from Nebraska's photograph requirement.

C. *Ease of Administration Is Not, On These Facts, A Compelling State Interest*

The second interest asserted by the petitioners is administrative convenience. Claims such as this are not new to Free Exercise cases. Similar arguments were made and rejected in *Sherbert* v. *Verner, supra,* 374 U.S. at 406-07; *Thomas* v. *Rev. Bd., supra,* 450 U.S. at 718-19. *But see, Braunfeld* v. *Brown, supra,* 366 U.S. at 606.

The difference between the cases—aside from the very different attitude towards Free Exercise claims—see *supra,* p. 19, n.*, *supra,* is that in *Braunfeld* v. *Brown,* enforcement of an exemption was thought by this Court to have been completely impractical, because of the incentive to cheat offered by the chance to gain significant competitive advantage. On the other hand the small number of applicants for exemption in *Sherbert* v. *Verner, supra,* and *Thomas* v. *Bd., supra,* coupled with the substantial economic disincentives for turning down employment, made the administrative burden manageable in these cases.

This case is far closer to *Sherbert* v. *Verner, supra,* and *Thomas* v. *Rev. Bd., supra.* The unusual nature of respondent's religious claim, coupled with the disadvantages to the average citizen of turning down a highly useful form of identification, suggest that the problems of administering an exemption will be minimal. While no one seems to know just how many persons could possibly seek an exemption, it seems certain to be substantially less than even the number of Sabbatarians who claim the protection of *Sherbert* v. *Verner, supra,* or *Thomas* v. *Rev. Bd., supra.*

D. *Administrating An Exception Would Not Entangle Government With Religion*

Petitioners also insist that creating an exemption would require sensitive inquiries into religious beliefs, and that this would unduly and impermissibly entangle the state with religion. This argument misconceives the nature of the administrative entanglement branch of the so-called three part test, *Lynch* v. *Donnelly, supra,* 104 U.S. at 1362; *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and, in any event, is belied by the widespread use of religious exemptions in other areas of the law. *See generally,* Marcus, *The Forum of Conscience: Applying Standards Under The Free Exercise Clause,* 1973 Duke L.J. 1217 (1973).

The existence of constitutional rights which touch upon religion means that on occasion government will be called upon to determine whether a particular practice is religious. If that inquiry were to constitute an undue entanglement, the religion clauses themselves would be unconstitutional, *see* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Institutions,* 79 Col. L. Rev. 1514, 1516, at n.9 (1979).

This Court has been careful to avoid that pitfall. Not all inquiries about religion are impermissible, *Mueller* v. *Allen, supra,* 103 S.Ct. at 3071. Brief, non-recurring, non-judgmental, inquiries into whether a textbook is secular or sectarian, for example, are permissible, *Id.* And while inquiries into the truth or falsity of religious beliefs are constitutionally proscribed, inquiries into the sincerity with which those beliefs are held are not. *Thomas* v. *Rev. Bd., supra; U.S.* v. *Ballard,* 322 U.S. 78 (1944). The state and

federal courts, as well as the administrative agencies have had extensive experience in determining sincerity in a variety of cases, ranging from the conscientious exemption statutes (where exemption was quite literally a matter of life and death) to unemployment insurance and claims by prisoners for special treatment, *see, e.g., Africa* v. *Commonwealth of Pennsylvania,* 662 F.2d 1025, 1030-31 (3d Cir. 1981).

The need to single oneself out as different is in itself a significant safeguard against false claims. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, supra,* 80 Harv. L. Rev. at 1413. Where, as here, there is no apparent non-religious secular interest which would provide a motive for false claims, and where, as a matter of fact, the petitioners suggest no evidence indicating a lack of sincerity on Quaring's part, the assertion that the need to inquire into sincerity would be unworkable is little more than idle speculation, not amounting to a compelling interest, *Sherbert* v. *Verner, supra,* 374 U.S. at 406-07, citing *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).*

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* The United States objects [Brief at 11-12] that this means that the rights of small minorities are given greater protection than those of larger religious groups. The paradox is, of course, a natural outgrowth of compelling interest analysis.

There is, however, a more fundamental objection to this assertion. A religious group of substantial size, even if not a majority, is likely to have sufficient political power to protect its interests, and is less likely to have recourse to the courts. Individuals like Quaring lack the wherewithal to influence the legislature, and if these religious views are not to be silenced, must be able to invoke the Constitution.

Conclusion

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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December 14, 1984